

SOUTH AFRICA / JUDGMENT

Mohapi v Road Accident Fund (2017/22595) [2020] ZAGPJHC 40 (10 February 2020)

[2020] ZAGPJHC 40

COURT

South Gauteng High Court, Johannesburg

BEFORE

Seleka

CASE / FILE NUMBER

2017/22595

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****CASE****NO:2017/22595****(1)**

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

.....20/2/2020.....

.....

DATE

SIGNATURE

In

the matter between:

MOHAPI:	JACOB
	Plaintiff
	and
	ROAD
	ACCIDENT FUND
	Defendant

JUDGEMENT

SELEKA AJ:

Introduction

- [1] These are action proceedings in which two issues have been referred to trial, namely;
 - (a) the amount to be awarded to the Plaintiff for general damages; and
 - (b) the Plaintiff's claim for past and future loss of earnings or income earning capacity.
- [2] I am also required to determine the issue of costs, pursued by the Plaintiff on a punitive scale.
- [3] All other issues have become settled and the Defendant has, on the merits, conceded full liability to the Plaintiff for all proved damages.
- [4] The remaining issues were, by agreement between the parties, disposed of by way of a stated case, based on a statement of agreed facts, dated 18 February 2020, the date when the hearing could commence. To the statement of agreed facts was attached an Actuarial Report dated 7 February 2020, which both parties relied on for loss of past and future income.
- [5] At commencement of the hearing, I was advised by Counsel for both parties that the amount for past loss of earnings was no longer in dispute. That amount is R303 300, as per the actuarial report, to which the parties are agreed to apply a contingency deduction of 10%, resulting in the amount of R288 135.00.
- [6] Therefore, what remains for determination in regard to the second issue above is the Plaintiff's claim for future loss of income (or earning capacity). The loss is not in dispute. Only the extent thereof, and in particular the percentage of contingency deduction to be applied to the capitalised value determined in the actuarial report.
- [7] The report postulates two scenarios. In scenario 1, the Plaintiff is presumed to be unemployable and to remain unemployed in the future. Scenario 2 is premised on the assumption or expectation of the Plaintiff's employability, but at less than the pre-accident career potential.

- [8] The capital value of loss of earnings in scenario 1 is R1 854 700, and in scenario 2 is R606 400. The latter amount is arrived at by subtracting the amount postulated in the case of injured earnings, i.e. R1 248 300, from the capital value of the loss in the case of uninjured earnings, i.e. R1 854 700. These amounts are without contingencies.
- [9] It was contended on behalf of the Plaintiff that scenario 1 should be applied, to which a contingency deduction of 10% (R185 470) should be used, resulting in the amount of R1 669 230.00 for future loss of income.
- [10] For the Defendant, scenario 2 was preferred, to which 50% (R624 150) contingency deduction, it was argued, should be applied to the capital value of injured earnings, R1 248 300, resulting in R624 150 which should be subtracted from R1 576 495 (uninjured capital value after 15% contingency deduction) to give a difference of R952 345.00 as the amount to be awarded for future loss of earnings.
- [11] As regards general damages, the Plaintiff seeks an amount of R1.2 million, whereas the Defendant contends for approximately R735 000.

Brief Factual

Background

- [12] A brief narration of the facts giving rise to the Plaintiff's claim will suffice, as most of the facts are common cause between the parties, as per the statement of agreed facts.
- [13] The Plaintiff is a 44 year old male, born on 27 February 1976.
- [14] On 20 February 2017, at approximately 18h00, the Plaintiff was involved in motor vehicle accident. He was a passenger in a taxi (1st insured taxi) with which another taxi (2nd insured taxi) collided head-on.
- [15] As a result of the collision, the Plaintiff sustained a number of serious injuries and suffers from various sequelae. All this is confirmed in the joint minutes of experts procured by both parties, as well as uncontested reports of two of the Plaintiff's experts, where the Defendant provided no counter-report, viz Psychiatrist and Ophthalmologist.

Plaintiff's Injuries

- [16] Prior to the accident, the Plaintiff was physically fit and healthy, and employed as a motor mechanic for 15 years immediately prior to the accident.
- [17] Following the accident, he sustained a moderate traumatic brain injury and a C7 vertebral fracture, as well as facial injuries, lacerations to the forehead, dislocated knee and a fracture of the right acromion (right shoulder). His orthopaedic injuries are rated at 40% Whole Person Impairment (WPI), thus entitling him to a claim for general damages.

Sequelae

- [18] Post the accident, the Plaintiff is said to have residual neurocognitive impairment and post traumatic chronic headaches. He has 4% to 5% risk of post traumatic epilepsy, as a result of which his occupational therapist says he should avoid work that requires driving, climbing heights, working with hot or sharp substances, working along roads or working with fast machines. The occupational therapist concludes that the Plaintiff would no longer be suitable for his previous job as a motor mechanic, where he had to use electric tools. This reduces his employment options, quite significantly.
- [19] The neuropsychologists are agreed that the Plaintiff suffers from, inter alia, learning deficiency, and has difficulties in visual attention and memory, verbal concept formation, childish behaviour of impulsiveness and aggression. He scribbles, copying figures that have no relationship with the original design, suggesting instability in visual motor co-ordination and personality.
- [20] The Plaintiff's performance, in Ravens' SPM, fell below the 5th percentile, suggesting a definite below average individual intellectual capacity. He has poor attention and is unable to conceptualise both the common functional features of objects. He has poor eye-hand co-ordination in relation to speed, and tremors in both hands. He has very poor logical thinking, poor accurate visual perception, poor concrete reasoning, concept formation and concentration.
- [21] The experts further agree that the Plaintiff has a mental deficiency, suggesting extremely poor problem-solving ability, planning ability and visual-motor co-ordination. There is no evidence that the Plaintiff will experience spontaneous recovery in these areas. Based on this assessment, the Plaintiff is in all probability unable to return to work as a motor mechanic. It is opined by one expert that he might require supervision and sympathetic employment. However, on the strength of the decision in *Santam v Byleveldt* 1973 (2) SA 146 (AD), sympathetic compensation is irrelevant for purposes of quantifying the Plaintiff's future loss of income or earning capacity.
- [22] The Industrial Psychologist secured by the Defendant acknowledges the challenges experienced by the Plaintiff, and that his risk of developing epilepsy and his neuropsychological impairments in the injured scenario (scenario 2) will exert a negative effect on his future employment prospects, manifesting in delayed re-entry to the labour market and increased periods of unemployment. However, he opines that provided he benefits optimally from, inter alia, surgical and occupational therapy treatment recommended for him, the Plaintiff could re-enter the labour market as a motor mechanic in a supervisory role. Given the mental, intellectual, cognitive and psychological challenges experienced by the Plaintiff, I find it extremely difficult to accept this opinion, when the agreed facts show that it is the Plaintiff who requires supervision, and not the other way round.

- [23] Further, the opinion is only speculative and expressly made subject to the Plaintiff deriving optimal benefit from the recommended treatment. The prospects of such benefit materialising were not presented before me.
- [24] Accepting of the challenges and increased risks faced by the Plaintiff in securing future employment, the Defendant's Industrial Psychologist proposes that a higher post-accident contingency deduction be applied (in scenario 2), higher than pre-accident, the quantification of which remains the prerogative of the Court.
- [25] The Occupational Therapists are agreed that the Plaintiff has limited physical competence for physical based work, due to his cervical spine and the ongoing problems, which preclude him from all labour-intensive work. He presents with poor physical competence for work, due to poor neck agility and fatigue from constant pain. They agree that he suffers compromise and vulnerability, especially in his capacity to, in the long term, sustain occupation with alternative employers. Thus, they conclude that the Plaintiff has become less competitive in the open labour market and has limited employment options.
- [26] The uncontested findings of the Plaintiff's ophthalmologist are that the Plaintiff has a WPI of 11%, with an unsightly laceration on the upper eyelid of the right eye and a permanent traumatic optic neuropathology.
- [27] The severity and impact of the Plaintiff's injuries on his future earning capacity is demonstrated by the fact that when he returned to work post the accident, he only worked for less than a week, before his contract was terminated. He has since remained unemployed. In the joint minute of the Industrial Psychologists, they agree that the Plaintiff is no longer suitable to perform heavy physical work, and that since work as a mechanic is mainly heavy, the Plaintiff is no longer suited to perform this work.
- [28] Given all of the above, the suggestion that the Plaintiff could still be accommodated as a motor mechanic due to his extensive knowledge and experience in that field, is simply unpersuasive. I am unable to perceive of an employer who would take the risk of employing the Plaintiff, in any capacity, with the knowledge of challenges above. The Plaintiff's chances of securing gainful employment are almost certainly destroyed, completely.
- [29] It is plain from the above facts that the Plaintiff's challenges are not only physical, but also cognitive, psychological and mental. His mental capacity has been seriously compromised. His inability to demonstrate logical thinking, accurate visual perception, concrete reasoning, concept formation and concentration has stripped him of his ability to be employable. This is exacerbated by what is said to be a childish behaviour of aggression and impulsiveness.
- [30] These factors, also justify in my view, an order for the establishment of a trust to manage, for the Plaintiff's benefit, whatever money would become payable to him by the Defendant.

[31] In my judgment, a fair and reasonable amount for both general damages and loss of future earnings, is one that gives sufficient weight to all of the above factors.

[32] The legal position in this regard is trite, as plainly apparent from the authority referred to me by the Defendant's Counsel, viz. *Yimba v RFA*, Case No. 44866/2017 ZAGPPHC 485 (19 September 2019).

[33] It is apposite to refer to paras 13 and 14 in *Yimba*, where the Court said:

"[13] It is trite law that a court must consider and have regard to previous comparable cases when seeking appropriate compensation for general damages. An award made will be fair if it is consistent with previous cases of similar facts and law. However, comparable cases offer some guidance in assisting a court to arrive at its award and should not be viewed as an absolute standard."

[14] When considering general damages a court has a wide discretion to award what it considers to be fair and adequate compensation for the injured party. Even though I may have to consider the cases provided by the parties as a guide, it is, however, clear that all the cases I was referred to are not on all fours with the current case. I, therefore, have to arrive at a fair and appropriate award using my discretion in the light of all the facts before me".

[34] I intend to follow this approach.

[35] In argument, I was referred to a couple of cases by Counsel for the Plaintiff, said to be comparable to the present. The cases are *Zarrabi v RAF* 2006 (5B4) QOD 231 (T), *Suit MO v RAF* 2006 (5B4) and *Hall v RAF* 2013 (6J2) QOD 126 (SGJ).

35.1 In *Zarrabi*, – the plaintiff was a 30 year old female practising doctor and trainee medical specialist, who sustained severe injuries, which included severe diffuse axonal brain injury, with severe neuro-physical, neuro-cognitive and neuro-psychiatric consequences,

multiple facial lacerations, fractured nose, contusions of the chest with bilateral contusions of the lungs, rupture of the liver, and multiple contusions and abrasions to both legs.

As a result, she suffered from, inter alia, intellectual impairment, personality change, loss of depth perception, loss of vision of the right visual field and lack of drive, subtle speech, language and communication problems. The Court awarded R800 000 for general damages and over R9.6 million for past and future loss of earnings (in April 2006).

35.2 In *Suit*, – the plaintiff was 12 years old schoolgirl who also sustained severe diffuse axonal brain injury resulting in intra-cerebral

bleeding and cerebral oedema, multiple facial lacerations, fracture of the right humerus and left ulna, bilateral ankle fractures and fracture of the pelvis. She was discharged after a month in hospital with a walking frame. She had extensive scarring of the forehead. She suffered from intellectual impairment, coupled with personality change and lack of personal drive. She was awarded R600 000 for general damages and over R4.1 million for future loss of earnings.

33.3 In Hall, – the plaintiff was a 39 year old male, highly motivated sales manager and a world class cyclist who sustained multiple injuries, including fractured ribs on the left side, a moderate concussive head injury. He spent 5 days in Intensive Care Unit (ICU). As a result, he had a changed personality, lost confidence, suffered symptoms of organic brain syndrome. He was not completely unemployable, but would be reliant on a sympathetic employer. The Court awarded him R700 000 for general damages and over R5.6 million for future loss of income (in May 2012).

[34] These cases are not particularly comparable to the facts in the present case. However, there are similarities in regard to sequelae, and the amounts awarded are informative. I remain guided by what was said in Yimba.

[35] Defendant's Counsel urged me to follow this authority in regard to general damages, where the Plaintiff had suffered a traumatic brain injury and a fractured vertebra. The experts were not in agreement on whether the brain injury was mild or moderate. The amount awarded for general damages was R700 000 (in September 2019). As sequelae of her injuries, she suffered from chronic headaches, neurocognitive and neuropsychological deficits.

[36] In the present case, the sequelae are more serious and pronounced, and I have taken this into account in determining the fair and reasonable amount for damages.

[37] In my opinion the fair and reasonable amounts, in the present case, are as follows:

37.1 For General Damages: R1.2 million;

37.2 For Future Loss of Income: R1 576 495 (after applying 15% contingency deduction on scenario 1).

[38] The amount for past loss of income has already been agreed.

[39] In the exercise of my discretion, the amount for future loss of income is to be rounded off to R1.6 million. (cf: Southern Insurance Association v Bailey NO 1984(1) SA 98 (A) at 113 and 116G-117A). I would have arrived at the same or similar amount on scenario 2 by applying a higher post-accident contingency deduction, as proposed by the Defendant's Industrial Psychologist. The Defendant's counsel urged upon to apply a 50% contingency deduction. However, I do not believe that his submission is consistent with the opinion of the Defendant's own Industrial Psychologist, who proposes a higher contingency deduction (higher than pre-accident), and leaves the quantification thereof to the Court.

[40] One uncontroversial matter between the parties also merits attention. At a case management conference on 17 October 2019, the Defendant tendered an undertaking, as envisaged in s 17(4)(a) of the RAF Act 56 of 1996, to compensate the Plaintiff for all his future medical, hospital and ancillary expenses arising from his injuries. The undertaking was to be issued within 14 days of it being tendered, i.e. on or about 6 November 2019.

[41] However, the Defendant has to date failed to issue the undertaking and has proffered no explanation for this failure. The Defendant has indicated that it does not oppose an order directed it to issue the undertaking. I am persuaded that I should show my displeasure in this regard by making an appropriate order of costs against the Defendant.

Order

[42] In the result, I make the following order:

42.1 The Defendant is directed to pay the Plaintiff a sum of R3 088 135 made up as follows:

1. the amount of R1.2 million for general damages;
2. the agreed amount of R288 135, for Past Loss of Income;
3. the amount of R1.6 million for Future Loss of Earnings.

42.2 The aforesaid sum (R3 088 135) shall be payable within 14 days of the date of this Order into a Trust Account of the Plaintiff's Attorneys, M Raseala Attorneys, with the following details:

M Raseala Attorneys Trust Account

First National Bank

Branch code: 250805 (Bank City Branch)

Account no: [....]

42.3 The Defendant shall pay interest on the aforesaid sum at the legal rate prescribed from time to time, and which currently is 10% due from 14 days after judgment to date of payment.

42.4 The aforesaid sum R3 151 365.00 shall be kept in the trust account of M Raseala Attorneys, in an interest-bearing account in terms of Section 78(2) (A) of the Attorneys Act, No.53 of 1979 for the sole benefit of the Plaintiff as referred to below and the opening of a bank account of the Trust.

42.5 Plaintiff's attorneys, M Raseala Attorneys, shall cause a Trust to be established in accordance with the provisions of the Trust Property Control Act, No. 57 of 1988 in favour of the Plaintiff within three(3) months hereto, on the terms and provisions set out in the draft deed, attached marked "A".

42.5.1 In the event that the Trust is not established within three(3) months as contemplated in paragraph 6 above, the Plaintiff is directed to approach this Honourable Court within 30 days of the expiry of the first two(2) month period, to obtain further direction from this Honourable Court with regards to the administration of the capital amount awarded herein.

42.5.2 Pending the formation of the Trust, the First Trustees referred to in paragraph 6 above are:

42.5.2.1 directed to conduct within one (1) month hereof a "needs analysis" for the Plaintiff's maintenance;

42.5.2.2 authorised to advance a stipend to the Patient not exceeding R4 000.00 per month.

42.6 The Defendant is directed to, within 5 court days from date hereof, furnish the Plaintiff with the Undertaking it tendered in terms of Section 17(4)(a) of RAF Act, for the costs of the future accommodation of the Plaintiff in a hospital or nursing home or the treatment of or rendering of a service to him or the supplying of goods to arising out of the injuries sustained by him in the motor vehicle collision which occurred on 20 February 2017 and the sequela thereof, after such costs have been incurred and upon proof thereof.

42.7 The Undertaking shall include payment of:

42.7.1 The costs of the creation and administration of the Trust and the appointment of the Trustees as referred to in paragraph 7 above;

42.7.2 The remuneration of and the costs incurred by the Trustees in administering the Plaintiff's estate and the costs of administering the statutory Undertaking furnished in terms of Section 17(4)(a) of the Road Accident Fund Act; and

42.7.3 The costs of obtaining an annual security bond/s to meet the requirements of the Master of the High Court in terms of Section 77 of the Administration of Estates Act, No. 66 of 1965, as amended.

42.8 The Defendant is directed to pay the costs of the action, and only such costs as incurred from 17 October 2019 to the last day of the hearing, i.e. 19 February 2020 are to be payable on the scale as between attorney and client. Further, the costs shall include the following:

42.8.1 The costs attendant upon obtaining payment of the capital amount and/or the interest thereon;

42.8.2 the costs of counsel including but not limited to preparation, consultations, drafting of the stated case and heads of argument, the case management agenda and minutes, attendance at the case management conference on 17 October 2019 and appearances on trial on 17, 18 and 19 February 2020 respectively;

42.8.3 the reasonable costs of the reports, addendum reports, if any, RAF4 forms, if any, joint minutes and addendum joint minutes, if any, consultations and the preparation, qualifying and/or reservation fees, if any of the following expert witnesses:

48.8.3.1 Dr Ntimbani – neurosurgeon (including RAF 4 assessment);

48.8.3.2 Dr Kumbarai – Orthopaedic surgeon (RAF 4 assessment);

48.8.3.3 Drs Mkhabele & Indunah – diagnostic radiologis;

48.8.3.4 Ms M Gibson – neuropsychologist;

48.8.3.5 Dr M Vorster – psychiatrist;

48.8.3.6 Dr Weitz – ophthalmologist (including RAF 4 assessment);

48.8.3.7 Ms Motake – occupational therapist;

48.8.3.8 Mrs P Ngoako – Industrial psychologist;

48.8.3.9 Munroe Consulting Actuaries – 3 reports.

49.9 Payment of costs is subject to the following conditions:

49.9.1 The Plaintiff shall, in the event that costs are not agreed, cause the notice of taxation to be served on the Defendant's attorney of record; and

49.9.2 The Plaintiff shall allow the Defendant 7(seven) court days after taxation to make payment of the taxed costs.

49.9.3 The Defendant is liable for interest on the unpaid taxed or agreed costs or any portion thereof from 8 days after agreement or taxation at the legal rate prescribed from time to time and which currently is 10% to date of payment.

49.9.4 The Order must be served by the Plaintiff's attorneys on the Master of the High Court within 15 (fifteen) days from the date hereto.

SELEKA AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiffs : Adv F Docrat

Instructed by

: M Raseala Attorneys

Counsel on behalf of Defendants : Adv V de Wit

Instructed by

: Twala Inc

Date heard

: 18 & 19 February 2020

Date delivered

: 20 February 2020

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